

Energy Efficiency and Conservation Block Grant Small Jurisdiction Program

Davis-Bacon Act/Prevailing Wage Webinar Jan. 6, 2010

Questions and Answers

Attachment K: Solutions and FAQs

Q1: Why is Attachment K necessary?

A: Absent specific evidence, the Energy Commission assumes that prevailing wage laws apply to all labor and mechanical work on your Energy Efficiency and Conservation Block Grant (EECBG) projects. As the applicant, you are in a better position to know the types of projects you will be carrying out and the individuals that will be performing the work. Attachment K is a simple, uniform way for applicants to demonstrate and document whether federal or state prevailing wage laws apply to any part of your energy efficiency project, and to assist with identifying the applicable wage determinations.

Q2: All of our work will be performed by our own employees. Do we still need to fill out Attachment K?

A: Yes. Simply check the appropriate boxes to document the basis of your determination that your project is exempt.

Q3: Some of our activities will be performed by our own employees, and we will hire subcontractors for other activities. How do we fill out Attachment K?

A: Under "Other" for question #2 for both federal and state, you may list which projects or activities will be exempt from, and which will subject to, prevailing wage requirements. You may attach additional pages if necessary.

Q4: We are opting for the Direct Equipment Purchase. I thought prevailing wage does not apply to equipment purchases. Do we still need to fill out Attachment K?

A: Yes, prevailing wage requirements do apply. The Direct Equipment Purchase option was provided to streamline the analysis of whether a project is "cost-effective" as defined by USDOE and the Energy Commission. Direct Equipment Purchase projects involve procurement and installation, and are deemed cost-effective as long as installation costs do not exceed 50% of the total project cost. The labor costs associated with installation are still subject to prevailing wage laws.

Q5: We are applying as a collaborative. Do we complete a single Attachment K or an individual one for each local jurisdiction?

A: You may use your discretion. It may be easy for a small collaborative which is hiring a single subcontractor to fill out a single Attachment K, where a more complex set of projects for a larger collaborative might be best reflected individually. You may attach additional documentation, such as a simple spreadsheet, if that assists you in presenting the required information.

Q6: What is the “Responsible Official” required in question #4 under the Federal Davis Bacon Act?

A: DBA requires each weekly payroll submitted to the Energy Commission to be “accompanied by a ‘Statement of Compliance,’ signed by the Contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the Contract.” The signature serves as a legal certification of specific things including:

- That each laborer or mechanic (including each helper, apprentice and trainee) employed on the Contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3.
- That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the Contract.
- The accuracy of the information is correct and complete.

Each “Statement of Compliance” will be provided weekly by your Contractors to you on federal form WH-347. In turn, you are responsible for transmitting all of the WH-347 from each of your Contractors to the Energy Commission on a weekly basis. On Attachment K, you must identify the name and contact information of a person that the Energy Commission can readily contact if there is any question about any payroll transmittal. Because of the legal importance of the timely and accurate payroll certification under federal law, you should identify a person with sufficient accessibility and authority to be responsive to any questions from state or federal officials.

Q7: Who is the “authorized legal representative” who must sign Attachment K?

A: This must be the city attorney or county counsel or their delegate. This form serves as the applicant’s independent legal determination of whether state or federal prevailing wage laws apply to any of the projects funded by EECBG, and must be signed by a person authorized to make that legal determination.

Q8: We have not yet gone out for bid for a subcontractor, so we do not know exactly what job classifications or the number of individuals that will be employed. How are we supposed to complete the table under Section C?

A: We are going to modify the instructions for Attachment K and ask for this information by the Application Deadline **only if the applicant has it available**. If the applicant does not include it with its application, it must be submitted to the Energy Commission before work may begin under the grant Agreement.

NOTE: We strongly encourage applicants to forecast the federal and state wage determinations – and attach the applicable rates – based on what job classifications are likely to be employed (i.e., electrician, lighting technician, sheet metal worker), as this information is critical to your ability to estimate the contract labor costs reflected in Attachment E.

Q9: We will be hiring HVAC specialty workers for building projects, but I cannot find a federal general wage determination that applies. How do I compare whether federal or state prevailing wage is higher?

A: We have submitted this question to USDOE, and are awaiting a response. At this point, you may complete your application including the state prevailing wage rates for the HVAC trade, and indicate in the table in Section C that your determination is “pending” while we await federal guidance on this issue.

Attachment E: Solutions and FAQs

Q1: We are using volunteers for some of the installation work. How am I supposed to fill out Attachment E?

A: The position taken by the United States Department of Labor (DOL) on this issue is reflected in a May 29, 2009 advisory letter, which is available at <http://www.dol.gov/whd/recovery/AdvisoryLetterHenderson.pdf>. In this letter, the DOL provides only two conditions under which volunteer labor is exempted from Davis-Bacon Act (DBA) prevailing wage requirements: (1) where a **statutory exception** is “specifically provided for in the particular related Act under which the projects funds are derived;” and, (2) where the compensation, e.g., rates of pay, living allowances, or other benefits provided to participants in volunteer programs is **specified by federal statute**.

Q2: We are using job training program participants for some of the installation work. How am I supposed to fill out Attachment E?

USDOL has stated that:

- Individuals who meet the following definition may be employed as **apprentices** on DBA projects: A person employed and individually registered in a bona fide

apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau.

- **Trainees** must be persons registered in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which have been so certified by that Administration.

If you are intending to pay persons less than the federal or state minimum prevailing wage for the journey-level job classification, you must attach the supporting documentation from USDOL or DIR that justifies the lower rate.

Q3: For Direct Equipment Purchase proposals, potential contractors are simply quoting a per-unit total cost. How am I supposed to fill out Attachment E and break out Contract Labor?

A: Because prevailing wage laws apply to Direct Equipment Purchase projects, your procurement processes must require your bidders to disclose the wages and fringe benefits that they will be paying individuals to perform the installation, and certify that they will comply with all prevailing wage requirements. You should ask for quotes that include that level of detail in support of the per-unit cost.

Other Questions

Q: Can the January 12th deadline be slightly extended to provide agencies a little more time to meet this last minute request?

A: The deadline has not been extended, we recommend you continue working. We are hopeful that by making sections optional and only requiring labor and non labor inputs, jurisdictions will be able to comply with the deadlines.

Q: Since we haven't yet selected a subcontractor, can we include in the Scope of Work a deadline when our agency will provide detailed subcontractor Davis-Bacon Act information, with a provision that the grant will be not funded without Energy Commission review and approval?

A: Yes, this was addressed in the presentation. Please see the answer to Question 8 for Attachment K, above.

Q: Please clarify that we must send WEEKLY certified payroll information to the Energy Commission for all individuals, including those employed by subcontractors.

A: Yes, that federal law requires certified weekly payroll for all individuals entitled to prevailing wage.

Q: Regarding Attachment K part C, if the project is competitively bid through the contractor, how do we determine the wage classifications?

A: At this time, that information is optional at that detailed level. The grant agreement will require this information to be submitted to the Commission before work may commence on the project.

Q: Our city is planning on using our entire allocation on LED street light replacements. Do we have to complete attachments E and K if we use the PG&E program?

A: Yes.

Q: We are not sure how to fill out Attachments E and K without selecting a contractor.

A: This was covered in the presentation. Please refer to the answer to Attachment K, Question 8, above.

Q: We are receiving a Block Grant for a large county, do we still have to fill out Attachments E and K?

A: Large cities and counties do not submit information to the California Energy Commission. They submit information directly to the US Department of Energy.

Q: How can we find info to answer A-3 and B-3 on Attachment K?

A: The questions go to the applicant's legal determination on whether they are exempt. The best source for this information is your attorney and the CA Department of Industrial Relations and the US Department of Labor websites and hotlines. There are relatively few exceptions and clear documentation is needed if you are exempt.

The US Dep't of Labor Prevailing Wage Resource Book is at:
<http://www.dol.gov/whd/recovery/pwrb/toc.htm>

The CA Dep't of Industrial Relations prevailing wage determination web address is:
<http://www.dir.ca.gov/DLSR/PWD/>

The CA Dep't of Industrial Relations Public Works Manual is located at:
<http://www.dir.ca.gov/dlse/PWManualCombined.pdf>

Q: Can a competing entity file a complaint regarding prevailing wage violations?

A: Anyone can make a complaint about an alleged violation, however, information, evidence, and support is needed. Complaints without evidence are unlikely to be acted upon.

Q: Follow Up: Who can report and how?

A: Anyone can report a violation under Federal and state law. California law requires a complaint form be filled out that can be found out at www.dir.ca.gov.

Q: Please clarify the scope of work for craft delineations within a craft.

A: The classifications within a craft describe what a worker does.

Q: If a contractor, working on a project, bills a city or county and supplies the city or county with the weekly payroll for retroactive payment, is this compliant?

A: If the contractor is paying weekly and submitting weekly, they are under compliance.

Q: Does a city or county have to pay a contractor weekly?

A: No.

Q: We are a large county and are receiving an State Energy Program grant, do we have to retroactively submit Attachment K?

A: This workshop and attachments only apply to small cities and counties under the EECBG program administered by the Energy Commission.

Q: We will not bid on a project unless the grant is awarded. What do you recommend?

A: Our simplified instructions presented today should help.

Q: What is the Federal and California definition of a contractor or sub contractor?

A: In California, someone may hold a license to perform general construction issue by the Contractors State Licensing Board. . The surveys for state prevailing wages seeks data only from licensed California contractors.

Under Federal law, the definition of contractor is not what is relevant. Rather, it is the nature of the work that determines what job classification applies. Say the applicant is performing some work by themselves, and they get volunteers from a non profit for the rest. It doesn't matter if the non-profit defines itself as a contractor or not; everyone working on an ARRA-funded project is entitle to prevailing wage.

Q: Does unloaded direct labor include city contractor labor or just city employees

A: Includes city employees.

Q: City has lighting project with a cost of \$3,000, but will receive a rebate for \$2,900, so the city's part is only \$100. Does prevailing wage apply?

A: The contract price of \$3,000 applies, so yes, prevailing wage applies to the entire project amount. The rebate may also qualify as program income, for which there are federal rules and regulations.

Q: If the Energy Commission is not distributing the revised Attachment K and E until Monday, how are jurisdictions expected to get it to the Energy Commission by Tuesday?

A: The tables themselves will not be revised, only the instructions will be. The revisions will make parts of Attachments E and K optional.

Q: In order for the Energy Commission to receive applications by 1/12/10, jurisdictions will have to mail them by 1/7/10. Please confirm that all documents online are valid and up to date.

A: Yes, the online documents are valid and up to date.

Q: Attachment K must be signed by the authorized signature (by an attorney), how can we have this signed if the addendum will not be issued until Monday.

A: The Addendum will be issued Monday, and this slide show will be posted this afternoon. The Addendum will simply reiterate what was in the slide show. Jurisdictions can attach relevant slides if desired as proof that they have adhered to the new instructions presented today.

Q: Are hard copy signatures required, or can they be scanned in?

A: We require original signatures by the Application Deadline, to the greatest extent possible. If it is not possible, not, we will work with you after the Application Deadline, because we will need original signatures on all documents except the Resolution. The highest priority now is to get the application in.

Q: Please clarify the differences between a 'state certified electrician (trainee)' and 'trainees'

A: California law requires all electricians to be certified. This requirement is not part of prevailing wage law.

Q: What is the minimum size of the Davis-Bacon poster? Does it have to be in Spanish?

A: Every employer performing work covered by the labor standards of the DBRA must post the WH-1321 "Employee Rights Under the Davis-Bacon Act" poster(<http://www.dol.gov/whd/programs/dbra/wh1321.htm>) at the site of the work in a prominent and accessible place where it may be easily seen by employees. There is no particular size requirement. You can print out the poster at <http://www.dol.gov/whd/programs/dbra/wh1321.htm>.

For your convenience, the poster can be obtained in Spanish at <http://www.dol.gov/whd/regs/compliance/posters/davispan.htm>. Since the poster needs to be "accessible," the Spanish-language version will make the information more accessible if the primary language for any of the individuals working at the site is Spanish.

Q: We believe residential retrofits are exempt from Davis-Bacon Act and Prevailing Wage laws. Please confirm this.

A: The California Department of Labor has taken the position that single family housing retrofits are considered rehabilitation and are therefore exempt from state prevailing wage laws.

Under the federal Davis-Bacon Act, the US Department of Labor has held generally that single family housing retrofits are “repairs” and therefore subject to federal prevailing wage requirements.

There is a narrow exception for homeowner rebate programs where individual homeowners apply for grants or rebates for qualified energy efficiency retrofits for their own homes. In that case, the homeowner is not responsible for paying prevailing wages to the contractor that he or she retains. However, if the contractors performing the work on these homes are also receiving publicly funded payments or other incentives to complete the residential retrofit work, the public agency providing the incentive will need to ensure that all applicable prevailing wages apply.

Q: Our project provides audits for commercial buildings, are we exempt?

A: Energy audits, home energy ratings, and building inspections are exempt.

Q: What time will Addendum #2 be available on Monday, January 11th?

A: The attachments are not changing, only the instructions are.

Q: Will a postmark be accepted, or does the Energy Commission need to receive the application by the due date?

A: According to the way the solicitation is written, the Energy Commission must receive the application by the deadline. **PLEASE DO NOT STOP OR SLOW DOWN WORKING ON THE APPLICATION.**

Q: Given the new Addendum #2, can the application be postmarked on 1/12/10?

A: Please keep working on the application and just send it in.

Q: Is the city attorney acceptable for completing Attachment K?

A: Yes.

Q: A client has asked me who is allowed to sign the middle of Attachment K, page 3?

A: Because of the legal importance this document, applicants should identify a person with enough accessibility and authority to answer questions from both California and the Federal government.

Q: Attachment K only applies to small cities. Some customers are also applying for the low interest loans. Will Attachment K be required for the loans?

A: To the extent that prevailing wage applies to other pot of money, it likely will.

Q: Do sole proprietors need to comply with Davis-Bacon?

A: Yes. The U.S. DOE states: "Bona fide owners who are exempt pursuant to Department of Labor regulations, found at 29 CFR Part 541, are not laborers and mechanics and are not subject to the DBA. DOE recommends that owners of a business who also perform construction work list themselves on the certified payroll and under the column for "Work Classification" insert the word "owner." Additionally, the owner of a contracting or subcontracting company, or authorized officer or employee who supervises the payment of wages must sign the Statement of Compliance for the certified payroll."

Q: If the city attorney is unavailable to sign Attachment K at such a short notice, can the city manager sign instead?

A: The signature must be from an attorney.

Q: Please repeat the hotlines for the US Department of Labor and the California Department of Industrial Relations.

A:

DIR office – (415) 703 – 4340

DIR – Classification Issues – (415) 703 – 4774

DIR – Coverage Issues – (415) 703 – 4240

DOL – www.dol.gov/whd/recovery/pwrb/toc.htm

Q: Can we write "TBD" (To Be Determined) for page 5 of Attachment K?

A: You can write "TBD" for most cells except for the total contract labor cell.

Q: Is a public utility district acting as a contractor on a street light retrofit still subject to prevailing wage of the local government?

A: As long as the work is being performed by a public agency employee, prevailing wage does not apply.

Q: When employer payments are made to agencies instead of employees, is a PW-26 still required weekly?

A: When a private employer is making payments, forms are required to ensure the full rate was paid.

Q: Can you provide clarification on the prevailing wage definition?

A: The prevailing wage rate includes the wage plus a benefits component. The contractor must be able to demonstrate the full amount was paid. The prevailing wage is the total wage of all compensation required.

Q: Define public building distinct from public work.

A: Public works can be public buildings, streets, highways, sewer systems, etc. With Recovery Act funds, the definition of public works is irrelevant. All projects funded with Recovery Act funds are public works.

Q: Does the Davis-Bacon Act only apply to public works?

A: It may, depending on the uses of ARRA funds.

Q: Please clarify on the comment that rebates are considered program income.

A: We stated that rebates received by a local jurisdiction from a local utility “may” be considered program income. For example, if a local jurisdiction is investing \$10,000 from EECBG in a new HVAC system and receiving a \$1,000 rebate from the local utility, then the \$1,000 could be deemed “program income” and subject to further federal expenditure rules. Alternatively, an applicant may choose to show the total project cost as \$10,000 funded by \$9,000 from EECBG and \$1,000 as a match from the utility. We would need further details of the proposed utility rebate arrangement to determine whether a rebate is considered program income under federal grant regulations.

Q: Does the Davis-Bacon Act trigger prevailing wage?

A: Yes.

Q: If the city manager or official determines prevailing wage applies, does the city attorney have to complete Attachment K?

A: Yes.

Q: Can schooling costs be deducted from prevailing wage as well?

A: No, under California prevailing wage code, certain training costs can, but not schooling costs.

Q: Our city is doing a streetlight retrofit project and will be using Sacramento Municipal Utility District employees to do the retrofit work. Are they exempt from prevailing wage?

A: Under state and federal prevailing wage laws, you are exempt from paying prevailing wage if the work is performed by the employees of a local government agency. I do not know first-hand what the legal status of SMUD is, however I am sure they will be happy to assist you and your legal representative in determining whether they are a local

government agency that is exempt from prevailing wage. You should be sure, however, that they are not going to contract out the work.

Q: Applicants were instructed to obtain legal counsel signature on Attachment K, and to submit the Attachment K with our application by January 12, 2010.

We have two projects

Project A	Lighting Project using County labor
Project B	HVAC Replacement using contracted labor

Q: What is your recommendation for filling out the form when we have one project that is exempt, while one is not exempt.

A: Identify both projects on Attachment K, stating the basis for the exemption for one and the confirmation that the other will be subject to prevailing wage. You can attach additional pages if the space under the "other" option is not sufficient.